SUPREME COURT, U. S.

AUG 9 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 409

STANDARD ELECTRICA, S.A.,
Petitioner,

—against—

HAMBURG SUDAMERIKANISCHE DAMPFSCHIFFAHRTS-GESELLSCHAFT,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Proceedings Below

This case was tried on an agreed stipulation of facts (R. pp. 10a-15a). The Opinion of the Honorable Edward C. McLean, D. J., dismissing the libel is printed at R. pp. 1a to 9a and is reported in 262 F. Supp. 343.

The libelant appealed to the Court of Appeals, Second Circuit, which affirmed the decree of dismissal, 375 F. 2d 943. Petitioner's motion for a rehearing *in banc* was denied (R. p. 65a) and petitioner now, by petition for writ of certiorari, asks this Court to reverse the decisions of the District Court and the Court of Appeals.

Rule 19 of this Court states that a petition for review by certiorari "will be granted only where there are special and important reasons therefor."

There are no special and important reasons for granting the writ in this case; the decision is of interest only to the parties.

There is no conflict between the Circuits, and the decision rests on the particular facts of the case.

Question Involved

The question involved is whether the shipment consisted of 9 packages, as the Courts below found, or of 54 packages as petitioner contends.

Facts

The United States Carriage of Goods by Sea Act (46 U. S. Code Section 4(5)) provides:

> "(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. * * * "

Before the issuance of the bill of lading, the shipper filled out a dock receipt, the terms of which are stated in the Opinion of the District Court (R. 5a) 262 F. Supp. 344:

> "The receipt was on a printed form containing a caption reading: "Particulars Furnished by Shipper of Goods." Under this caption were four columns headed respectively, "Marks and Numbers," "No. of Pkgs.," "Description of Packages and Goods," and "Gross Weight Pounds." Under these headings, handwritten entries were made as follows: under "Marks and Numbers," was written "SESA 1297 #⅛." Under "No. of Pkgs." appeared "9." Under "Description of Packages and Goods" was written "Palletts TV Tuners." Under "Gross Weight Pounds" appeared "3420."

Below these entries, the dock receipt set forth the following printed legend:

> "Received the goods or packages said to contain goods herein mentioned in apparent good order and condition, except as otherwise indicated herein, to be held and transported subject to all the terms contained in the carrier's regular long form of bill of lading as now in use, including all clauses presently being stamped or endorsed thereon, all of which shall be deemed to be incorporated herein. Copies of such bill of lading and clauses may be obtained from the carriers on request and may be inspected at any of its offices. *Any declaration of value pursuant to applicable clause of the Carrier's regular form of bill of lading must be made by the shipper in writing upon delivery of the goods to the carrier and inserted on the face hereof as well as on the bill of lading and extra freight paid if required.*" (emphasis supplied)

No declaration of value was made by the shipper or by anyone else, nor was any extra freight paid.

The respondent issued a bill of lading (Ex. B attached to stip.) with headings identical to those of the dock receipt and typed entries under the heading were similar to those written on the dock receipt (R. 5a, 6a).

The marks and numbers were given as "⅛" the "No. of Pkgs." as "9 pallets" (R. p. 6a).

The make-up of each package is described by the District Court at R. 4a, and at 262 F. Supp. at p. 344. The goods were packaged by the shipper for its own convenience and not for that of the carrier.

On arrival of the ship at the discharge port there was a short delivery of the shipment, and the question at issue is whether the shortage was of 7 packages or of 42 (as claimed by petitioner).

The respondent has paid petitioner $3,500, plus interest, which was received by the petitioner without prejudice to its contention that there was a short delivery of 42 packages, and not of 7 packages, as found by the Courts below.

It was stipulated that if the Court found that there was a short delivery of 7 packages, a decree should be entered in favor of the respondent (R. 15a).

FIRST POINT

THERE WAS A SHORT DELIVERY OF SEVEN PACKAGES FOR WHICH RESPONDENT PAID PETITIONER $3500 ($500 PER PACKAGE) AND THAT ENDED THE MATTER.

The rule that the liability of a carrier may be reduced to a fixed sum unless the shipper declares an additional value and pays additional freight is well settled by many decisions of this Court, both with respect to carriage by land and carriage by sea. The leading case is *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, which case has been followed consistently. See *Southeastern Express Co.* v. *Pas-*

time Amusement Co., 299 U. S. 28; *George N. Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278.

In the *Hart* case, a shipment of horses was made, the bill of lading limiting liability to $200 per horse in the absence of a declaration of value. The horses were race horses worth many times $200, but this Court held that no more than $200 per horse was recoverable despite the fact that one horse was killed and others injured by the carrier's negligence.

The leading decision of this Court in a case of carriage by sea is *Reid* v. *Fargo*, 241 U. S. 544, where the bill of lading provided: "The value of each package shipped hereunder does not exceed $100 * * * unless a value in excess thereof is specially declared and stated herein."

A crated automobile was injured in the discharge and this Court held that the liability of the steamship company which issued the bill of lading, was limited to $100 as provided in the bill of lading.

The use of the word "package" in such clauses has been traditional in the carriage of goods by sea, and the same word was used when drafting the statute applicable to sea carriage.

In the following cases among others, decided prior to the enactment of the U. S. Carriage of Goods by Sea Act, 1936, the word "package" was used, and the carrier's liability limited accordingly:

The Caledonier, 31 F. 2d 257, at p. 259;
Lamb v. *Camden and A. R. R.*, 2 Daly (N. Y.) 454;
The Cayo Mambi, 1 F. Supp. 116, affd. 62 F. 2d 791;
Reid v. *Fargo*, supra;
Beaumont Export & Import Co. v. *New York & Cuba Mail S. S. Co.*, 286 Fed. 120, C. A. 5.

The leading English decision as to the meaning of the word "package" is *Whaite* v. *Lancashire and Yorkshire Railway Company,* L. R. Exchequer Cases Vol. 9, page 67.

In *Whaite,* the plaintiff placed various articles in a wagon which was open at the top. The wagon was then loaded on a truck on the defendant's railway for conveyance to Manchester. Due to a collision on the line, the contents of the wagon were injured, and the question to be decided was whether the wagon, with its contents, was a package within the meaning of a statute restricting the liability of common carriers. At page 69 Bramwell, B., said:

> "I think this waggon with its contents was a 'package' within the meaning of the Act. * * * It is to be observed that the plaintiff himself and his foreman authorize us in so describing it, for they say they 'packed' the goods in the waggon, and no one would doubt that this expression was rightly used; but if so, then the waggon so packed with goods was a package."

The definition of a "package" in Black's Law Dictionary (4th ed. 1951) is:

> "A bundle put up for transportation or commercial handling; a thing in form to become, as such, an article of merchandise or delivery from hand to hand. A parcel is a small package; 'parcel' being the diminutive of 'package'. Each of the words denotes a thing in form suitable for transportation or handling, or sale from hand to hand."

The principal decisions construing the word "package" in the Carriage of Goods by Sea Act are:

> *Mitsubishi International Corp.* v. *S. S. Palmetto State, et al.,* 311 F. 2d 382 (C. A. 2, 1962), cert. den. 373 U. S. 922;

Pannell v. *United States Lines,* 263 F. 2d 497 (C. A. 2, 1959), cert. den. 359 U. S. 1013;
Middle East Agency, Inc. v. *The John B. Waterman,* 86 F. Supp. 487 (S. D. N. Y., 1949);
Eyles v. *United Fruit Company,* 1942 A. M. C. 1470 (S. D. N. Y.), not officially reported;
The Margaret Lykes, 57 F. Supp. 466 (E. D. La., 1944).

Obviously, a package may consist of a container in which are placed smaller articles or packages.

In *State* v. *Parsons,* 124 Mo. 436, 27 S. W. 1102 (1894), the Court held that separately wrapped bottles shipped together in a box constituted a single package, saying, at 27 S. W. 1104:—

> "In *Keith* v. *State* (Ala.) 8 South. 354, it is said: 'The term 'to pack' in its ordinary signification, especially when used in reference to carriage, means to place together and prepare for transportation, as to make up a bundle or bale; and 'package' is a bundle or bale made up for transportation. It may consist of a single article; *but when separate articles are placed together, and prepared for* transportation in a bundle, bale, *or box, or other receptable, they do not form as many separate and distinct packages as there are articles,* though they may be wrapped separately. The case or box or bale in which separate articles are placed together for transportation constitutes the 'original package,' in the commercial sense." (emphasis supplied)

In *Haley* v. *State,* 42 Neb. 556, 60 N. W. 962 (1894), the Court quoted with approval the following language

from an earlier Pennsylvania decision, *Commonwealth* v. *Schollenberger*, 27 Atl. 30, (42 Neb. at page 561):

> "'Package' means a bundle or parcel made up of several smaller parcels, combined or bound together in one bale, box, crate, or other form of package.'"

In the case at bar, the shipper described the shipment as consisting of 9 packages in the dock receipt, supra, page 3, the bill of lading (R. 5a-6a), and in the invoice (R. 6a). After the loss was discovered, the petitioner wrote to the respondent's agent complaining that "only 2 packages were discharged" out of "a shipment of 9 packages." (R. 7a) The word "package" is not defined in the statute and this leaves the parties free, within limits, to agree as to what constitutes a "package." See *Pannell* v. *United States Lines, supra,* page 7, and *The Margaret Lykes, supra,* page 7. In the litigation the libelant changed its tune and asserts that the shipment consisted of 54 packages and the respondent is liable for nondelivery of 42 packages.

In the present instance, the agreement between the parties, as evidenced by the dock receipt and the bill of lading, is that the shipment consisted of 9 packages, 7 of which were not delivered. The respondent paid the libelant a total of $3500, i.e., $500 for each package not delivered. This ended the matter.

SECOND POINT

PETITIONER SHOWS NO REASONS FOR GRANTING THE WRIT.

There is no conflict between the Circuits, as already pointed out. The decision in *The Margaret Lykes, supra,* page 7, in the Eastern District of Louisiana is completely in accord with the decision in the case at bar.

This is an "old-fashioned" case. A "container" is not involved. There is nothing novel in placing one or more cartons on top of others and enclosing them between wooden platforms held together by metal bands. Attached to the Statement of Facts in the Court below and made a part of respondent's record in the Court of Appeals is a drawing of one of the packages as delivered to the carrier for transportation. This drawing is reproduced as respondent's Appendix to this brief.

The petitioner says that shipments may now be made in "containers," the contents of which may be of a value of several hundred thousand dollars.

Obviously, if such a shipment were to be made and no value declared, the carrier's limitation would be $500 since the "container" is nothing but a box or package. The Court of Appeals for the Second Circuit, in effect, so decided in *Mitsubishi International Corp.* v. *S. S. Palmetto State, supra,* and this Court denied a petition for a writ of certiorari, 373 U. S. 922.

If a large box or a container is presented to the carrier for shipment, must the carrier tear it open to ascertain if there are not boxes inside, as petitioner apparently contends?

The same reasoning applies to the case at bar. The shipper represented that it was making a shipment of 9 packages (See *supra,* page 3). The respondent was entitled to take the shipper at its word and assume that the respondent was shipping 9 packages and not 54 packages (a number not mentioned in either dock receipt or bill of lading).

On a shipment of 9 packages the respondent's liability would not exceed $4500, whereas if there were a shipment of 54 packages, the possible liability would amount to $27,000 requiring a high degree of care on respondent's

part. By the representation that the shipment consisted of only 9 packages, the petitioner is now estopped from claiming that there were 54 packages.

At pages 19 and 20 the petition cites, and misstates, *The Edmund Fanning,* 201 F. 2d 281 (C. A. 2, 1953). In that case, a shipment of 10 locomotives and tenders were lost as the result of a fire, for which the carrier was liable. The amount of liability on the part of the shipowner was one of the issues.

At page 286 of 201 F. 2d, the Court discussed the question of the amount of the carrier's liability, holding that an uncrated locomotive was not a "package," because the locomotive was not packed in any way. The carrier's limitation therefore fell under the second part of the pertinent paragraph of the Carriage of Goods by Sea Act, quoted *supra,* page 2, which reads:

> "in case of goods not shipped in packages, per customary freight unit * * *."

It has been held that when the goods are not shipped in packages and the freight is based on the weight or measurement of the goods, then liability is computed by multiplying the total of the units of measurement by $500. On the other hand, if lump sum freight is agreed to for each article, without regard to weight or measurement, then liability as to each article shipped is limited to $500 in the absence of a value declaration.

In *The Edmund Fanning* case, the Court said: "The shipping unit and the unit for computing the freight charge were the same," i.e. the freight was a lump sum of $10,000 for each locomotive and tender. Since 10 locomotives and tenders were lost, the total liability was $5000 (See 201 F. 2d at page 286).

Petitioner erroneously states at page 20 that the *Fanning* case held that "the $500 limitation must be multiplied by the number of 40 cubic foot units, which would allow full recovery." This statement of the result of the case is wholly incorrect.

In any event, *The Edmund Fanning* is not relevant here as the locomotives and tenders were not boxed, crated or packed in any way and, hence, were held not to be packages.

The size of each of the 9 packages in the case at bar was 39 inches long, 33 inches wide and 42 inches high (262 F. Supp. 344), and the weight of each package was only 380 pounds (same reference). The value of each of the 9 packages as claimed by petitioner was $2400.

There was nothing abnormal about a package of the above size and value. In *Mitsubishi International Corp.* v. *S. S. Palmetto State, supra,* each of the three "packages" involved weighed about 3½ tons, and the damage sustained amounted to $31,000. Because of the provisions of the Carriage of Goods by Sea Act, the amount of recovery was limited to $500 per package.

The claim that the shipment of bulky and heavy packages is a recent development is erroneous. As long ago as 1868, a case of machinery weighing 2½ tons was shipped from Liverpool to Vancouver. *British Columbia Sawmill Co.* v. *Nettleship,* L. R., 3 Common Pleas 499, at page 500. (The question as to the meaning of the word "package" did not arise in the case.)

See, too, *Potter* v. *North German Lloyd,* 50 F. Supp. 173, shipment of a lift van full of furniture from Hamburg to Portland in July, 1939; *Beaumont Export & Import Co.* v. *New York & Cuba Mail S. S. Co.,* supra p. 5, caterpillar tractor held a package; *Kratina* v. *South Atlantic S. S. Co.,* 63 F. Supp. 895 (S. D. Ga.), 2 cases of used removal goods each weighing more than 3 tons.

Petitioner contends that the Carriage of Goods by Sea Act is a "remedial statute" and hence should be "liberally interpreted" so that the carrier must assume liability for 54 packages even though the shipper has notified the carrier that only 9 packages have been shipped. Such a contention is difficult to discuss with patience.

The Carriage of Goods by Sea Act is not a remedial statute in the sense of the decisions petitioner cites.

The Carriage of Goods by Sea Act originated at the International Convention for the Unification of Certain Rules Relating to Bills of Lading signed at Brussels August 25, 1924. These rules were annexed as a schedule to the English Carriage of Goods by Sea Act, 1924. [14 and 15 Geo. 5, Ch. 22] The Carriage of Goods by Sea Act is now the law throughout the British Commonwealth including all British colonies and the Carriage of Goods by Sea Act has also been enacted in most of the countries of Western Europe including Hungary, Poland, Rumania and Yugoslavia; some countries in the Middle East and the Philippines and Japan in the Far East; also in Argentina and in the Ivory Coast, (Carver on Carriage of Goods by Sea, 11th Edition, Volume II, page 1321).

The Carriage of Goods by Sea Act was not adopted by the United States until 1936, (46 U. S. Code § 1300-1315) 12 years after its enactment in Great Britain.

The proper construction of the Act is stated by Lord Hailsham, Lord Chancellor, in *Gosse Millerd, Ltd.* v. *Canadian Government Merchant Marine*, [1929] App. Cas. 223 at page 230:

> "I am unable to find any reason for supposing that the words as used by the Legislature in the Act of 1924 have any different meaning to that which has been judicially assigned to them when used in contracts for the carriage of goods by sea before that

> date; and I think that the decisions which have already been given are sufficient to determine the meaning to be put upon them in the statute now under discussion."

The enactment by Congress of the Carriage of Goods by Sea Act carried with it the construction of the Act by the English Courts.

The Carriage of Goods by Sea Act was a regulatory and not a remedial statute. It provided that the limitation of value per package should not be less than $500. This was not greatly higher than the package limitation in common use by 1936 when the Carriage of Goods by Sea Act became law in the U. S. A.

The Carriage of Goods by Sea Act gave some rights to the shipowner which it did not have before, such as the provision that the carrier and the ship should be discharged from all liability unless suit were brought within one year after the date the goods were, or should have been, delivered. 46 U. S. Code § 1304 (6). Also 46 U. S. Code § 1304 (1) in substance abolished the warranty of seaworthiness at the commencement of the voyage substituting the obligation on the carrier's part to exercise due diligence.

The Act should be construed in accordance with the fair meaning of the words used and should not be bent to favor one party or the other.

There is no "cleavage" among the judges of the Second Circuit on the question involved in the case at bar as claimed by petitioner at p. 18.

The leading case is *Mitsubishi International Corp.* v. *S. S. Palmetto State, supra,* in which the decision was unanimous.

Of course, different cases involve different facts. In *Gulf Italia Co.* v. *American Export Lines, Inc.*, 263 F. 2d 135, cited by petitioner on page 20, the superstructure of

a tractor had been partially covered. If the tractor had been shipped without any covering it would not have been a package, and the Court held 2 to 1 that the tractor had not become a package by this partial covering. The decision of the majority was dissented from by Circuit Judge Moore.

Petitioner also cites the decision of the Court of Appeals for the Second Circuit in *The Edmund Fanning* case, discussed *supra*, page 10, but as already pointed out petitioner has entirely misunderstood that decision because liability was not based on "the number of 40 cubic foot units." (*supra*, page 11)

That there was no "cleavage" among the judges of the Second Circuit is demonstrated by the order signed as a result of petitioner's motion for a rehearing which was unanimously denied (R. p. 59a), the Chief Judge of the Court of Appeals signing a separate order reading:

> "No active judge having requested that a vote be taken on the suggestion that the case be reheard in banc the same stands denied." (R. p. 63a)

LAST POINT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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